No. 622

In the Supreme Court of the United States

OCTOBER TERM, 1941

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

A. H. BELO CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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This reply brief will consider: (1) respondent's contention that it is not subject to the Fair Labor Standards Act because some of its employees are not "engaged in commerce or in the production of goods for commerce"; and (2) its further contention that it is exempt under Section 13 (a) (2) as a "service establishment."

1. Respondent contends (Respt. Brief, 72–81) that its "newspaper employees" [1] are not "engaged

[1] Respondent's category "newspaper employees" is used to exclude from the scope of the argument the employees whose activities are necessary to the operation of respondent's

in commerce or in the production of goods for commerce" within the meaning of Section 7 of the Act. In the circumstances of this particular case, we submit that the Court should not exercise its undoubted authority to consider this ground urged in support of the judgment below. The Government petitioned for certiorari herein on the single basis that the decision below had sanctioned a device which permitted emasculation of Section 7 [2] and therefore

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radio station, WFAA; respondent apparently concedes that those employees are "engaged in commerce." Other employees render services to both enterprises; thus reporters gather news locally which is then broadcast from WFAA as well as being printed in respondent's newspaper (R. 373).

[2] On March 20, 1942, subsequent to the filing of our main brief herein, the Circuit Court of Appeals for the Eighth Circuit affirmed *Fleming* v. *Carleton Screw Products Co.*, cited at pages 22, 31, and 39 of our main brief, which held that a somewhat similar device could not be employed to defeat the application of the statute. In that case the defendant sought to maintain its previous work-week without increasing the compensation paid to the employees, most of whom had been receiving hourly rates ranging from 45 to 80 cents, and had been working 50 to 56 hours weekly. The employees signed agreements setting forth agreed hourly rates of pay 10 cents less than they had been receiving, with a guarantee by defendant that if the weekly compensation figured at the "agreed rate" for the statutory work-week plus one-and-a-half times that rate for overtime hours was less than the sum yielded by multiplying the total number of hours by the prior hourly rate, it would pay a "bonus" or "gratuity" equal to the difference. The Circuit Court of Appeals sustained the holding of the District Court that the "regular rate" was not the agreed rate, but the rate yielded by dividing the total compensation paid by the number of hours worked, that is, the hourly rate prior to

presented a question of great importance in the administration of the Act. Although both courts below had rejected respondent's contention that none of its employees were subject to the Act (R. 189, 486), the answer to the petition not only did not mention the coverage question but, on the contrary, affirmatively requested the Court to review the Section 7 issue. This course of procedure afforded a cogent inference that respondent had abandoned the contention (see our Main Brief, note 3, p. 4) and may have led the Court to undertake review of a question which cannot be decided if the abandoned issue may now be reopened and if respondent's position thereon is well taken.

If the coverage issue involved the extent of federal power under the commerce clause, reasons of policy might speak persuasively against holding respondent to the terms of its waiver. But admittedly no question of constitutional power is presented (Respt. Brief, 72–76); the matter is solely one of statutory construction, and that in a comparatively minor field of the Act's operation.

But if the Court wishes to consider the coverage issue, we submit that the Act is plainly applicable here. Respondent is engaged at Dallas, Texas, in the publication of a daily newspaper, *The Dallas Morning News,* and other periodicals, and in the

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the agreement. The court expressly rejected the reasoning of the court below in the present case. Its opinion is reported at 5 Wage Hour Rept. 238.

operation of radio station WFAA (R. 7–8).[3] The newspaper has had, since November 1, 1938, an average daily press run of some 110,000 copies, about 1,850 of which are distributed outside the State of Texas (R. 378–379).[4]

For the material which is published in its newspaper, as well as for the supplies necessary to printing, respondent is substantially dependent upon the channels of interstate commerce. The publication of the paper occasions constant large scale interstate transmission of news and other materials such as features, comics, photographs, and advertising. Respondent is a member of the Associated Press, from which it receives daily news reports and "wire photos" from all parts of the world (R. 373–374).

[3] WFAA is a 50,000-watt station licensed by the Federal Communications Commission and affiliated with the National Broadcasting Company, Inc. It broadcasts national advertising and rebroadcasts programs received from other States, as well as news from abroad and other States, which is delivered to it over the wires of the United Press. Its broadcasts and rebroadcasts are received in States other than Texas (R. 371–373).

[4] Until December 31, 1940, respondent also published the *Semi-Weekly Farm News;* between October 24, 1938, and December 31, 1940, the press run was about 100,000 copies, some 26,000 of which were distributed to subscribers in States other than Texas (R. 379). Between November 1, 1938, and December 1, 1940, respondent published 52,986 copies of the *Texas Almanac and Industrial Guide*, and shipped out of the State 1,704 copies (pltf. ex. 16, R. 108, 379). The employees here involved worked on the three publications without segregation of labor during the period covered by the complaint (R. 382).

News reports are also received daily from the United Press (R. 375). Respondent maintains a news bureau at Washington, D. C., and correspondents at Mexico City, Mexico; from its employees in those cities it receives by mail and wire a steady stream of material for publication (R. 381).[5] Extensive national advertising is placed in respondent's paper through an agency with offices in New York, Chicago, Detroit, San Francisco and Los Angeles (R. 123–124); such advertising constitutes about 18 percent of the paid advertising published by the *News* (R. 379–380). The necessary mats, cuts, and copy for this national advertising are received from outside the State (R. 124, 380–381). Until January 1, 1940, respondent purchased all of its newsprint outside of Texas, and since that date 70 percent (R. 381–382). The *News* uses 12,000 tons of newsprint a year, which arrives at the rate of a carload a day (R. 392, p. 19).

Respondent furnishes to the Associated Press news stories, feature articles and photographs prepared by members of the *News* staff (R. 122). In

[5] Other matter for publication received from outside the State includes news and feature articles from North American Newspaper Alliance, Inc. (R. 375–376); copy and matrices of feature articles and cartoons (R. 376); mats, forms, etc., from various feature syndicates (R. 376–377); copies of a Sunday supplement magazine called "This Week" (R. 377); and matrices and forms for the comic section (R. 377–378).

accordance with its uniform practice,* the press service transmits this material over its wires to its member newspapers within and without the State of Texas (R. 373–374).

Section 7 of the Act provides that "no employer" shall employ "any of his employees who is engaged in commerce or in the production of goods for commerce" for workweeks longer than the number of hours specified unless overtime compensation is paid for the excess hours. Thus the application of the section turns primarily upon the nature of the employee's duties. *Fleming* v. *Arsenal Building Corp.*, 125 F. (2d) 278, 280–281 (C. C. A. 2), pending on writ of certiorari, No. 924, present Term; *Fleming* v. *A. B. Kirschbaum Co.*, 124 F. (2d) 567, 569–570 (C. C. A. 3), pending on writ of certiorari, No. 910, present Term; cf. *Warren-Bradshaw Drilling Co.* v. *Hall*, 124 F. (2d) 42, 44 (C. C. A. 5). Respondent concedes that this is the statutory test (Respt. Brief, 78). It therefore becomes necessary, if the coverage issue is to be disposed of in detail by this Court, to consider the various categories of employees involved and to determine, as to each class, whether its members are engaged either "in commerce" or in the "production of goods for commerce," as broadly defined in Section 3 (j) of the Act.

This process would have to be undertaken here without benefit of pertinent findings by the courts

* See *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 125–127.

below; since both courts found that respondent's employment contracts did not violate Section 7, there was no occasion for an inquiry into which of respondent's numerous employees would be included within an injunction.[7] Since the judgment dismissed the complaint with respect to all employees as to whom violations were alleged, it cannot stand if a single employee is subject to the Act and if Section 7 was violated as to him. In that event the correct procedure, we submit, is a reversal of the judgment below and a remand to the district court for purposes of framing an appropriate decree covering those classes of employees found by the court to be subject to the Act.[8]

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[7] The district court judge stated in his oral opinion "Of course the News is engaged in interstate commerce. It sends its papers everywhere. It receives supplies and news from abroad. It is a great institution. Radio is interstate commerce * * *" (R. 189). The Circuit Court of Appeals stated that "On the jurisdictional point, the testimony was sufficient to support the finding that defendant, as to the employees in question, was subject to the act" (R. 486).

[8] Respondent's bald statement that since the injunction requested in the complaint is applicable to all of its employees it "is not sustainable unless all are actually engaged in interstate commerce" (Respt. Brief, 78, 72) is unsupported by any authority and is intrinsically unsound. Courts have and exercise jurisdiction to grant in part and deny in remainder relief sought. Respondent's position is that if there were a failure of proof with respect to a single employee, but convincing proof with respect to hundreds of others, the injunction must nevertheless be denied *in toto*. The Government is not asking this Court to "sustain" an injunction

A number of employees covered by the complaint are within the scope of the Act. Respondent does not deny that the employees engaged in operation of its radio station are "engaged in commerce" (see Respt. Brief 72), and it is clear that they are. Station WFAA receives from other states, and rebroadcasts programs and news, and participates in nation-wide "hook-ups"; its broadcasting is heard in other states (R. 371–373). All employees whose work contributes to the operations of the station are engaged in commerce. *Fisher's Blend Station, Inc.*, v. *State Tax Commission*, 297 U. S. 650–655; *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 279; *Fleming* v. *Capital Broadcasting Co.*, 4 Wage Hour Rept. 124 (M. D. Ala. 1941).[9] And employees engaged in

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issued below; it seeks reversal of a judgment denying an injunction and dismissing the Administrator's complaint with respect to all employees as to whom an injunction was sought.

[9] Employees Brown, Ellis, and Wicker work in the control room of the radio station, "feeding" programs from the studio to the transmitter, regulating the volume, and otherwise controlling the mechanics of the broadcast (R. 109, 111, 125–126). Alderman and Hartzell are announcers (R. 108, 110). DeHay receives and schedules the programs (R. 109). Kuehn "clears" programs and music for broadcasting (R. 110). Martin rewrites news bulletins for presentation over the air (R. 110). The employment arrangement whose validity is challenged by the complaint is in effect as to these employees, as well as to all employees other than linotypers, pressmen, and others in the printing departments, who are covered by union agreements (Main Brief, note 4, p. 5).

the unloading of newsprint and other materials which move to respondent's plant from points in other states are as plainly "engaged in commerce" *Baltimore & O. S. W. R. R.* v. *Burtch*, 263 U. S. 540, 544; *Puget Sound Co.* v. *State Tax Commission*, 302 U. S. 90, 92; *Super-Cold Southwest Co.* v. *McBride*, 124 F. (2d) 90, 92 (C. C. A. 5).[10]

The same conclusion is indicated with respect to employees in the addressing and wrapping departments and those engaged in carting to the Post Office the papers and mail, including the large number of pieces addressed to destinations in other States.[11] Employees in the bookkeeping department receive the copy of national advertising, schedule its appearance in the *News* on the proper date, and bill the out-of-State advertiser (R. 124, 392, p. 4). These employees and others engaged in arranging for, purchasing, procuring, or receiving

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[10] Mountique, Fair, and Burleson, employees in respondent's paper room, are engaged in receiving newsprint at the plant (R. 67-68, 135).

[11] Four employees in the stencil department operate the machines which print the names of subscribers on the wrappers (R. 392, p. 7). Conkle, Morrow and other employees in the mail room wrap newspapers for delivery through the mails (R. 68-69, 137, 392, p. 6). More than 3,000 sacks of mail a year, including the newspapers, are carried to the Post Office by the truck drivers (R. 69, 392, p. 6). Mrs. Lovell, Newnam, Martin and numerous other employees are engaged in handling incoming and outgoing letter mail (R. 72, 125, 129). A special post office maintained within the building requires the services of three or four employees (R. 392, p. 5).

materials, features, and advertisements and news sent to respondent from other States, are "in commerce." *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 128; *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 107; *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, 290; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 54; *Federal Trade Commission* v. *Pacific States Paper Assn.*, 273 U. S. 52, 63–64; *Cleveland & St. Louis Ry.* v. *Dettlebach*, 239 U. S. 588, 595.

The remaining employees engaged in publication of respondent's newspaper may well also be found to be "engaged in commerce." The enterprise of which they are part maintains a continuous stream of interstate communication and transportation to Dallas and from Dallas to similar enterprises throughout the Nation (*supra*, pp. 4–6). These activities "involve the constant use of channels of interstate and foreign communication. They amount to commercial intercourse, and such intercourse is commerce within the meaning of the Constitution.", *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 128. See also *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co.*, 293 U. S. 268; *International News Service Co.* v. *Associated Press*, 248 U. S. 215, 229; *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, 9–10; *National Labor Relations Board* v. *A. S. Abell Co.*, 97 F. (2d) 951 (C. C. A. 4); *National Labor Relations Board*

v. *Hearst*, 102 F. (2d) 658 (C. C. A. 9); *Press Co.* v. *National Labor Relations Board*, 118 F. (2d) 937 (App. D. C.). And there can be no doubt that such activities constitute "commerce" within the meaning of the Act; Section 3 (b) broadly defines that term to include "transmission, or communication among the several States."

Finally, all employees who are engaged "in any process or occupation necessary to the production" of respondent's newspaper are likewise engaged "in the production of goods for commerce" as broadly defined in the Act (Secs. 7, 3 (j)). Cf. *Philadelphia B. & W. R. R. Co.* v. *Smith*, 250 U. S. 101, 103. The 1,800 copies of respondent's newspapers which are daily sent across State lines are goods of commercial value and constitute a substantial amount of interstate commerce by any standard. And the constitutional basis of regulation being firmly established, respondent's comparison of the intrastate and interstate circulation upon a percentage basis is relevant "only to the extent that Congress may be taken to have excluded commerce of small volume from the operation of its regulatory measure by express provision or fair implication." *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 607. There is no warrant for inference of such an intent.[12] This Court has recognized

[12] The Act has been held applicable to certain employees in the following cases where only a small percentage of the employer's business was interstate in character; *Muldowney*,

that, in framing the act, Congress "has made no distinction as to the volume or amount of shipments * * *." *United States* v. *Darby*, 312 U. S. 100, 123. The purpose of the Act was to free the channels of interstate trade from goods produced under substandard labor conditions; Sec. 15 (a) (1), significantly, forbids the shipment in commerce of "any" goods so produced. Cf. *Hipolite Egg Co.* v. *United States*, 220 U. S. 45; *United States* v. *Thirteen Crates of Frozen Eggs*, 215 Fed. 584 (C. C. A. 2).[12]

The breadth of the statutory definitions of "commerce" and "produced" (Sections 3 (b), (j)) affords a cogent answer to respondent's contention that the Act is inapplicable because of the absence of the phrase "affecting commerce" (Respt. Brief, 72–73, 75–76). Neither the stated purpose of the

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v. *Seaberg Elevator Co.*, 39 F. Supp. 275 (E. D. N. Y.) (0.2%); *Cooper* v. *Gas Corp. of Michigan*, 4 Wage Hour Rept. 550 (C. C. Mich. Mason Co. 1941) (0.56%); *Steger* v. *Beard & Stone Elec. Co.*, 4 Wage Hour Rept. 411 (N. D. Tex. 1941) (1%); *Schwartz* v. *Independent Food Products Co.* (D. N. J.), May 13, 1941 (1.5%); *Campbell* v. *Superior Decalcominia Co.*, 31 F. Supp. 663 (N. D. Tex.) (3%); *Fleming* v. *Hitchcock*, 38 F. Supp. 358 (S. D. Fla.) (16%); *Wood* v. *Central Sand & Gravel Co.*, 33 F. Supp. 40 (W. D. Tenn.) (15–20%).

[12] In recommending enactment of a wage and hour statute, the President advised Congress that goods produced under substandard labor conditions "should be regarded as contraband and ought not to be allowed to pollute the channels of interstate trade." House Document No. 255, 75th Congress, 1st sess., p. 3.

Fair Labor Standards Act, nor the terms of the regulation it imposes, nor its legislative history, lend weight to a contention that, unlike the National Labor Relations Act, it does not evidence "the intention of Congress to exercise whatever power is constitutionally given it to regulate commerce." *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 607.[14] The congressional debates were cast in terms of the extent of constitutional power to regulate wages and hours in view of apparently conflicting decisions of this Court; the premise that the proposed legislation reached the limits of that power was assumed.[15] See, *e. g.*,

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[14] Both statutes seek to eliminate specified evils found by Congress to burden and obstruct commerce. Unfair labor practices by employers were declared in the National Labor Relations Act to "lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce"; the elimination of such practices was sought because it "promotes the flow of commerce by removing certain recognized sources of industrial strife or unrest * * *." (49 Stat. 449, 29 U. S. C. sec. 151). In section 2 of the Fair Labor Standards Act, Congress stated that the production of goods under substandard labor conditions "burdens commerce and the free flow of goods in commerce" and "leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce."

[15] The sole exception to this statement concerns regulation of production for exclusively intrastate sale or consumption of goods which compete with goods brought into the State in interstate commerce. Cf. *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349; *Shreveport Case*, 234 U. S. 342. A provision specifically extending the bill to such activity (S. 2475, 75th Cong., 2d sess., as recommitted

83 Cong. Rec. 9166 ff.; *Joint Hearings before the Committee on Education and Labor, United States Senate, and the Committee on Labor, House of Representatives on S. 2475 and H. R. 7200* (75th Cong., 1st sess.) pp. 1–14, 19.[16]

2. Respondent contends (Respt. Brief, 82–84) that employees of newspaper publishers whose circulation is predominantly intrastate are exempt from the Act as employees "engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce" (Section 13 (a) (2)). The short answer is that this construction of "service establishment" renders entirely meaningless the specific exemption, in another subdivision of the same section, of persons "employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published" (Section 13 (a) (8)). Respondent's subordination of this "inferential inclusion" of other types of newspapers to the "express

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Dec. 17, 1937, sec. 8 (a)) was dropped from an intermediate draft by the House Committee (S. 2475, 75th Cong., 3d sess., as reported April 21, 1938; H. Rept. 2182).

[16] Senator Borah was of the opinion that a newspaper which shipped only 20 or 30 copies outside of the State was subject to the proposed statute (83 Cong. Rec. 9172). And Senator Wagner stated that the scope of the bill was as broad as that of the National Labor Relations Act (83 Cong. Rec. 9173).

exclusion of service institutions" assumes that newspapers are *ipso facto* "service establishments." Whatever the validity of such an assumption as a general proposition—and respondent offers no authority—it seems likely that in the context of Section 13 (a) (2) "that phrase should be limited to those who serve consumers directly, like tailors, or garages, or laundries; the juxtaposition of retail selling and 'servicing' does indeed suggest as much.". *Fleming* v. *Arsenal Building Corp.*, 125 F. (2d) 278, 280 (C. C. A. 2), pending on writ of certiorari, No. 924, present Term; see also *Fleming* v. *A. B. Kirschbaum Co.*, 124 F. (2d) 567, 572–573 (C. C. A. 3), pending on writ of certiorari, No. 910, present Term.[17]

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[17] The scope of the "service establishment" exemption is before the Court in the *Kirschbaum* and *Arsenal* cases. See Memorandum for the Respondent, No. 910, p. 2. In Interpretative Bulletin No. 6, revised June 1941, par. 24, the Administrator stated that "Typical examples of service establishments akin to retail establishments, within the meaning of the exemption are: Restaurants; cafeterias; roadside diners; hotels; tourist houses; trailer camps; home laundries; barber shops; beauty parlors; public baths; scalp-treatment establishments; masseur establishments; funeral homes; embalming establishments; crematories; establishments engaged in cleaning, dyeing, pressing, altering, and repairing hats, clothing, and household goods for private individuals; valet shops; shoe repair shops; shoeshine parlors; dress-suit rental establishments; public garages; automobile laundries; 'drive it yourself' establishments; battery shops; parking lots; musical instrument repair shops; piano tuning establishments; radio repair shops; watch, clock, and jewelry repair establishments; household refrigerator service

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and repair shops. These establishments operate in the same manner as retail establishments and have substantially the same attributes. The principal difference is that their revenue is derived primarily from the sale of service instead of from the sale of merchandise." The scores of industries whose members have claimed the benefit of the exemption but which were not deemed sufficiently similar to the retail establishments with which they are grouped in Section 13 (a) (2), are enumerated in paragraph 29 of the bulletin.

U. S. GOVERNMENT PRINTING OFFICE: 1942